question on the material before me for the reason that the Summons in Chambers has been filed without any supporting affidavit. It seems to me that where an applicant is asking the Court to exercise a discretion in his favour, which discretion depends upon the Court being satisfied of the existence of sufficient grounds for something or other, there should be an affidavit setting out the grounds upon which the applicant relies in asking for the exercise of the discretion. I am placed in a position of peculiar difficulty in considering the present application because while Counsel for the applicants, in the course of his submissions, informed me that the defect which it was proposed to cure by the institution of fresh proceedings was the failure of the applicants to file the statement of account required by section 21(1) of the Moneylenders Ordinance, 1951, it appears from the affidavit which the respondent filed that there are or may be other defects in the proceedings which the applicants might take the opportunity to cure if they were allowed on withdrawal of Originating Summons No. 97 of 1957 to file a fresh originating summons. In my view, the proper course for me to take in these circumstances is to dismiss the present application with costs to the respondent but to give liberty to the applicants to apply and, if they do so apply by a fresh originating summons supported by an affidavit setting out the grounds upon which they ask for the exercise of my discretion in their favour, the sufficiency of those grounds can then be considered on their merits; and I order accordingly.

Order accordingly.

Solicitors: *Cheang Lee & Ong; N. Sharma.*

ABU BIN HUSSIN v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Good and Neal JJ.) April 28, 1958]

[K.L. — F.M. Criminal Appeal No. 12 of 1958]

Criminal Law and Procedure — Confession — Failure of trial Judge to direct jury as to truth or otherwise of — Retrial.

The appellant in this case had been convicted of murder and sentenced to death. At the trial he elected to give evidence on his own behalf. He admitted having made a voluntary statement to the Magistrate but denied the correctness of the recorded statement, and gave a version of what happened which briefly was to the effect that he had been out shooting wild boar and had shot the deceased and the witness by accident. The learned trial Judge in his charge to the jury said with regard to the recorded statement: "Accused denied making certain statements recorded in the confession. If you reject the evidence contained in the confession then you will have to be satisfied that the Magistrate was not telling the truth."

Held: (1) that part of the direction of the learned trial Judge overlooks the fact that two entirely separate and distinct questions had to be considered in relation to the so-called confession: (i) whether in fact the appellant did say the things he was said to have said, and (ii) whether or not these things were true;

(2) the jury should have been told that if they were satisfied that the appellant did make the statement, they should then consider whether it was true and that they should do so by considering it in the light of the rest of the prosecution evidence and in the light of the different story told by the appellant in the witness box. *White v. R.*(1) followed.

Retrial ordered.

Case referred to:—

(1) *White v. R.*, A.I.R. 1945 P.C. 181.

COURT OF APPEAL.

K. C. Chia for the appellant.

Mohd. Salleh bin Abas (Federal Counsel) for the respondent.

The judgment of the Court was delivered by —

Thomson C.J.: — This appellant was tried by a Judge and jury at the Muar Assizes for the murder of a woman, Chua Ng Kiow, on 26th June, 1957. He was convicted and sentenced to death. He appealed against his conviction and on 9th April, 1958, we allowed his appeal and ordered a retrial.

At the close of the evidence in the case there was no room for doubt that the dead woman died as a result of receiving into her body pellets from a gun fired by the appellant. Apart, however, from a statement made by the appellant himself the prosecution evidence probably fell short of establishing that fact and did not throw a great deal of light on the surrounding circumstances.

Apart from the appellant's own statement the prosecution evidence was (and none of it was seriously denied) that the appellant had been supplanted in fairly profitable employment by the dead woman and a man named Loh Boon Teck. On the morning of the shooting, in a kampong near the rubber plantation where the dead woman met her death, he borrowed a shotgun and 14 cartridges on the pretext that he wished to shoot flying foxes. Some time afterwards at least two shots were heard in the rubber plantation and later the dead woman was found dead and Loh Boon Teck was found

wounded, both of them having been injured by shotgun pellets. The following day in a kampong some distance away the appellant was found by his uncle with the gun and 14 cartridges, three of which were by this time expended.

The appellant was arrested that day and the following day he made a voluntary statement before a Magistrate, the admissibility of which was not challenged at the trial. That statement as recorded by the Magistrate was to the effect that he had been unemployed for some time, that his family was hungry and that "I lost the balance of my mind." On the morning of the killing he took a gun and cartridges and went to the scene of his former labours where he saw a Chinese woman tapping. "I was then not of clear mind and so I shot her once. Then I ran away.....and I saw a Chinese man tapping and I fired a shot at him."

At the trial the appellant elected to give evidence on his own behalf. He admitted that he had made a voluntary statement to the Magistrate but he denied having said the things which have been quoted and he gave a version of what happened which briefly was to the effect that he had been out shooting wild boar and had shot the dead woman and the witness Loh by accident.

The learned Judge summed up the case to the jury at considerable length and with very great care. In our opinion, however, he failed to deal correctly with the statement alleged to have been made by the appellant shortly after his arrest. What he said was this:

"Accused denied making certain statements recorded in the confession. If you reject the evidence contained in the confession then you will have to be satisfied that the Magistrate was not telling the truth."

In our view this statement overlooks the fact that two entirely separate and distinct questions had to be considered in relation to the so-called confession. The first was whether in fact the appellant did say the things he was said to have said and the second was whether or not these things were true. On the first question there was probably little room for doubt, but it would be faulty ratiocination to come to the conclusion that because the appellant did in fact say these things these things were necessarily true, or to think that the statements made by the appellant in the so-called confession could only be disbelieved if the jury were satisfied that the Magistrate himself was not telling the truth as to what was said.

In our view the jury should have been told that if they were satisfied that the appellant did make the statement they should then consider whether it was true and that they should do so by considering it in the light of the rest of the prosecution evidence and in the light of the different story told by the appellant in the witness-box. As it was put by Sir John Beaumont in the case of *White v. The King*[1]:—

"The jury should have been cautioned that confessions are not always true, and that they must be checked, more particularly in a murder case, in the light of the whole of the evidence on the record in order to see if they carry conviction."

Had the jury been so directed they might well have come to the conclusion that the contents of the statement were true. They might well, although this may be more problematical, have thus been led to a conclusion unfavourable to the appellant. On these points, however, we were unable to form any definite opinion and were unwilling to speculate. In the circumstances we thought we had no option but to quash the conviction and order a re-trial.

Appeal allowed on 1st ground and Retrial ordered.

GOH CHENG SEE v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Rigby and Syed Sheh Barakbah JJ.) April 28, 1958]

[Penang — F.M. Criminal Appeal No. 53 of 1957]

Bankruptcy — Rash and hazardous speculation — Contracting debt "without having any reasonable ground of expectation of being able to pay" — Bankruptcy Ordinance (S.S. Cap.45), s.114(c) and (d).

These proceedings were commenced by Notice of Motion to the effect that the Court would be moved for an order that the appellant undergo imprisonment on the grounds that he had contravened section 114(c) of the Bankruptcy Ordinance by contracting ten specified debts provable in bankruptcy without having when he contracted them any reasonable ground of expectation of being able to pay them and that he had contravened section 114(d) by contributing to his bankruptcy by three speculative transactions in rubber futures of which full particulars were given and which were said to be rash speculations. The case came for hearing before Shepherd J., and he held that the appellant had contravened section 114(c) in respect of all but three specified debts and that he had contravened section 114(d) in respect of all the specified transactions, and sentenced him to three months' imprisonment in respect of the contravention of section 114(c) and three months' imprisonment in respect of the contravention of section 114(d), these sentences to run concurrently.

Against the whole of that decision the appellant appealed.

Held: (1) the evidence in this case, the truthful-